

Is there a solution?

The Kermadecs

Introduction:

1. I became Attorney General of New Zealand and Minister for Treaty of Waitangi Negotiations in early November 2008. I was lucky to hold these portfolios throughout the nine years of the Key/English Administrations and surrendered my warrants on 23 October 2017 following the change of Government ¹.
2. During that nine-year period:
 - a. I negotiated over sixty deeds of settlement with iwi, including the Tuhoe and Whanganui River Settlements which have attracted a lot of interest internationally because of the recognition of legal personality in natural resources.
 - b. I worked with the Maori Party and others to repeal the awful Foreshore and Seabed Act 2004 to restore to Maori the right to access to our courts to restore customary rights which the previous government had extinguished.
 - c. I negotiated a deed of reconciliation with Parihaka. This deed acknowledged the horrendous actions of the Army in 1881 when Parihaka was invaded and basic standards of British justice ignored.
 - d. I established the Post Settlement Commitments Unit to safeguard the integrity of settlements. This has now morphed into Te Arawhiti which is an agency of the Ministry of Justice responsible for Foreshore / Seabed Policy, The Office of Treaty Settlements and durability of Settlements.
 - e. Sadly, I failed to reform Te Ture Whenua Act 1993. Reform was defeated by selfish vested interests.
3. Given my ministerial experience, I have come to know a great deal about our country's history – both good and bad. I have also appreciated that things have gone badly wrong in the Crown/Maori relationship when:
 - a. first, the Crown in the person of the colonial State has, historically, often failed to observe natural justice and the rule of law in its dealings with Maori; and
 - b. secondly, the Crown has failed to recognise and respect the property rights of Maori.

¹ On 30 January, 2019 I left Parliament to resume practice as a barrister. (see <https://www.bankside.co.nz/barrister/hon-christopher-finlayson-qc/>)

Most of the wrongs I apologised for over the years can be traced to a failure to respect these fundamental concepts.

4. What does it mean to act in accordance with the rule of law? This is not a law lecture so I will be brief. The rule of law is a fundamental principle of our constitution which means politicians govern within their powers, the law applies equally to all and the law is certain. The late Lord Bingham in England identified a number of principles to define the rule of law including:
- the law must be accessible, clear and predictable;
 - the law should apply to all, except where objective differences justify differentiation;
 - the law must afford adequate protection of human rights;
 - The law should provide access to justice, especially where people cannot resolve disputes themselves ².

I readily acknowledge that the State is more than capable of producing bad law, which is discriminatory, inequitable and unjust and that it can do this both legislatively and judicially. I believe we need a constitutional mechanism to enable our society to remedy the effects of bad legislation but discussion of that is for another day.

5. The decision maker must:
- (a) Hear the other side;
 - (b) Not be biased; and
 - (c) Consult which means genuine not pro forma consultation. Consultation does not mean informing someone of a result ³.
6. Finally, protection of property rights and their importance to the economy. Again, much has been written on this subject and I don't think I need to dwell on the topic too long ⁴. It is well known that insecure property rights hinder economic opportunities for the poor. Property rights cannot be disregarded without consequences. I like the way the late Justice Hammond expressed it many years ago:
- “Property rights are very strong rights. They rank in the hierarchy of rights recognised by law, just behind absolute constitutional rights. In more colloquial terms, on a scale of one to ten, constitutional rights are a ten and property rights are a nine”⁵.

² See the Rule of Law by Tom Bingham, Penguin Books, 2011, ISBN 978-0-141034-53-9.

³ See *WIAL v Air NZ* [1993] 1 NZLR 671

⁴ See, for example, “Property Rights: the key to economic development” The Cato Institute’s Policy Analysis No 482.

⁵ *A H Properties Ltd v Tabley Estates Ltd* (unreported, 1993, High Court, Hamilton Registry, para 36).

7. In the Treaty of Waitangi, the Crown agreed to protect Maori fisheries. Virtually all fisheries legislation since the 1860s recognised that duty of protection of Maori interests – although we must remember, it had always failed to define the nature and extent of the right. So, the Maori fisheries issue has been around for a long time. A transforming event in this area was the Fisheries Amendment Act 1986, which substantially amended the Fisheries Act 1983 to bring into operation the Quota Management (“QMS”) system. The 1986 Act was a reaction against the former regime of open slather and government subsidy, which had led to a massive expansion of the fishing industry from 1963. At the same time the inshore fishery dramatically declined as a result of overfishing.
8. The 1986 amendment moved away from the older regulated system which contained no conservation incentives toward the creation of valuable and transferrable property rights in the resource.
9. The QMS was introduced on 1 October 1986. In response, Maori obtained an injunction against the Government to prevent further fishstocks being introduced into the QMS until the issue of ownership had been resolved.
10. As a result of the action taken by Maori, the courts confirmed that Maori customary fishing rights were controlled by “hapu and tribes” and that those customary rights contain both commercial and non-commercial elements. One judge said that:

“there is a strong case that before 1840 Maori had a highly developed and controlled fishery over the whole coast of New Zealand, at least where they were living. That was divided into zones under the control and authority of hapu and tribes of the district. Each of these hapu and tribes had the dominion, perhaps the rangatiratanga, over those fisheries. Those fisheries had a commercial element and were not purely recreational or ceremonial or merely for the sustenance of local dwellers.”
11. After that case, negotiations began.

The outcome of those drawn out negotiations was a settlement in which Maori agreed:

- that all Maori commercial fishing rights and interests were settled or provided for;
- to accept regulations for customary non-commercial fishing;
- to stop litigation (including any Tribunal claims) relating to Maori commercial fisheries;
- to support legislation to give effect to the settlement; and

- to endorse the QMS.

12. It was clearly understood by Maori that they were not only receiving existing rights but that there was also a right to development. Beyond the general principle of a Treaty right to development, for example, there could be an undeveloped fisheries management area or species that, with the passage of time and improved fishing techniques could be worked up into a commercially valuable settlement. This right to development is very relevant when I come to talk about the proposed establishment of a marine reserve in the Kermadecs.
13. Some years ago, the Government of which I was a member, announced the establishment of the Kermadecs Sanctuary to be created in the Kermadec region of the South Pacific Ocean about 1000 kilometres northeast of New Zealand. At 620,000 square kilometres, it would be one of the world's largest and most significant fully protected areas. It would be 35 times larger than the combined area of New Zealand's existing 44 marine reserves. Once in place, the Sanctuary would mean that 15 percent of New Zealand's ocean environment would be totally reserved from even the most carefully managed sustainable fishing activity⁶.
14. The Sanctuary is proposed to cover an area of New Zealand's Exclusive Economic Zone (EEZ) from 12 to 200 nautical miles from the five Kermadec Islands of Raoul, Macauley, Cheeseman, Curtis and L'Esperance which lie halfway between New Zealand and Tonga. It will be the first time an area of our EEZ has been fully protected.
15. The Sanctuary follows the establishment in 1990 of the Kermadec Marine Reserve which consists of 7500 square kilometres. The Marine Reserve extends 12 nautical miles from the cliffs and boulder beaches of the various Kermadec Islands and rocks, out to the edge of the territorial sea. Maori were consulted on the establishment of this Marine Reserve and agreed to support its creation. The new Sanctuary proposal is a vastly different proposition both conceptually and geographically.
16. The Kermadec area is said to be one of the most pristine and unique places on Earth. It includes the World's longest chain of underwater volcanoes and the World's second

⁶ Similar sanctuaries have been established in the Pacific. Last year the US Government announced The Pacific Remote Islands Marine National Monument; The UK has established an 835,000 square kilometre sanctuary around the Pitcairn Island Group; and a 720,000 square kilometre marine park has been established around Rapa Nui (Easter Island). The latter proposal will allow fishing by the local population.

deepest ocean trench at over 10 kilometres - deeper than Mount Everest is tall. Its waters are home to:

- over six million seabirds of 39 different species
- over 150 species of fish
- 35 species of whales and dolphins
- three species of sea turtles - all endangered
- many other marine species unique to this area such as corals, shellfish and crabs.

17. The Kermadecs area is one of 10 New Zealand fisheries management areas and is known as FMA10. A total of about 20 tonnes of fish are caught there every year with a value of about \$165,000. The species caught are highly migratory and include swordfish (11 tonnes), bigeye and albacore tuna (three tonnes) and blue shark (2.8 tonnes).

18. The quota for these highly migratory species is for New Zealand's entire EEZ and is not specific to FMA10. As the catch can be caught in other parts of New Zealand's EEZ, fishing interests will not, be significantly impacted by the establishment and extension, of the Sanctuary.

The Maori Response:

19. Maori were very unhappy with the proposal. Almost immediately after the announcement, it was alleged that there had been inadequate consultation and that the proposed Sanctuary undermined the fisheries settlements. Let us look at these allegations.

20. I think Maori are right about the absence of adequate consultation. A quick phone call to Ngati Kuri, the far North iwi, was not enough. It occurred shortly before the announcement. The basic requirements of consultation, with all those affected, were not satisfied. That shouldn't be surprising. In my years in office I often found that consultation with Maori was flawed – invariably rushed and superficial, often telling people what is going to happen rather than actually consult them. The matter goes beyond the 'quick chat on the phone syndrome', though. The allocation mechanisms devised and imposed by the Clark Labour government made deep water fisheries the property right of all Maori on a basis of population. This produced some very questionable and perverse outcomes which I am not going to explore here. For the moment I want to emphasise that

in respect to the Kermadec Sanctuary proposal there was no consultation with ‘all Maori’ or even a proxy for that expression.

21. There was also inadequate consultation within government. Observing the very detailed Cabinet process limits the opportunity for things to go wrong. Interdepartmental discussion and discussion at officials’ level followed by consideration by Cabinet committee then Cabinet will enable the issues to be highlighted and any red flags to be raised.
22. The allegation that the Settlement has been undermined is a very serious charge which worries me. Let us consider it. Earlier I mentioned the right to development. The settlements reached in 1989 and 1992 were not just about existing opportunities but future opportunities as well. FMA10 may not have much fishing in it now but, in years to come with climate change and different fishing methods, the situation may be completely different. There could be valuable commercial opportunities. One of the things that really disturbed me after the storm broke was the complete lack of understanding by Crown officials of the fisheries settlements reached in 1989 and 1992. When I asked officials of the Ministry for the Environment to explain their understanding of the 1992 settlement, they didn’t really know what I was talking about. Little wonder then that Te Ohu Kaimoana mounted a public relations campaign which asked what the difference was between Maori property rights and Pakeha property rights. The answer: Maori property rights can be interfered with at will by the Crown and are not as valuable as Pakeha property rights.
23. Maori accepted the QMS, which included defined QMAs, as the basis of a Treaty Settlement. It was a core condition on the Crown side agreed to by Maori. If the Crown now wants to change the QMS, it cannot do it unilaterally without being in breach of the Settlement. Such change requires Maori agreement. It should be noted that the Inshore Kermadec (12 mile) Zone currently has the highest possible international level of marine protection. As I have already noted, this was imposed with the agreement of Maori.
24. In the Kermadec Zone there is no evidence of fish-stock depletion or abundance in any species. The only fishery of any current scale is in fact migratory Tuna which can, by definition be harvested either to the North or the South of proposed Sanctuary. The case for the Sanctuary cannot on any evidence be made on any presently observable danger to bio-diversity or ecology.

25. The point made by Maori is that if the Crown can unilaterally alter the system it entered into as a condition of the Fisheries Settlements of 1989 and 1992, it has the capacity to alter any Treaty Settlements on its own political whim. That is a very troubling statement.
26. The legislation giving effect to the Sanctuary is now in limbo because the issues have not been resolved. It was deferred in 2016 because a coalition partner threatened to leave if the Government proceeded with the proposal. I don't think it will be resolved by further consultation. Applying a principled approach to the matter, the proposal in its current form cannot proceed as it undermines the rights of Maori recognised as recently as 1992. In any event, a strong argument can be made that with the QMS, there is in fact no need for such a large marine reserve. Conservation of fisheries species is an essential ingredient of the QMS. It is the intelligent and proper recourse to that system on which we should rely for the conservation and management of our fisheries resources.
27. As JFK once said, we should strive to find what unites us rather than belabour the problems which divide us. When one considers the state of our oceans, we can very quickly agree on the damage caused by, for example, plastics in the environment. The Royal Society Te Aparangi has just released a comprehensive report on the use and disposal of plastics and their effect on human health and the environment ⁷. I suggest that it be compulsory reading for all with an interest in the health of our seas. The report is frightening. Much has also been written about the Northern Pacific which is known as the Great Pacific Garbage Patch.
28. Most people are aware of the shocking state of Henderson Island, one of the most remote places on earth. It is part of the Pitcairn Group. I developed a great interest in these islands many years ago when I acted for the Governor of Pitcairn in a case about whether he could be sued in the courts of New Zealand ⁸. Henderson Island should be a jewel of nature and instead it is covered in plastic. It is the best example of the need for urgent action to protect our oceans and marine environment before it is too late ⁹.

⁷ The report may be found at royalsociety.org.nz/plastics

⁸ *Sutton v Governor of Pitcairn* [1995] 1 NZLR 426

⁹ See, for example: "Henderson Island has the World's highest density of plastic pollution" <https://www.nationalgeographic.com/news/2017/05/henderson-island-pitcairn-trash-plastic-pollution/>

29. Most people are also aware of the need to protect valuable fisheries and at risk species like whales. New Zealand has been very active on the International Whaling Commission over the years and in 2013 intervened in the case brought by Australia in The International Court of Justice in the Hague to challenge Japanese whaling in the Southern Oceans. I was Counsel for New Zealand, a real highlight of my legal career. New Zealand and Australia had an emphatic win in the ICJ although, sadly, it hasn't stopped Japan's whaling operations ¹⁰.
30. So, conservation of precious resources and protection of our oceans are imperatives we can all agree on without too much debate.

The way forward:

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31. I think these could be the ingredients of a resolution of this unfortunate problem:
- a. Any solution has to be based on ecology, not ideology. In today's world, there is an increasing danger of facts being less important than ideology. It is a very dangerous phenomenon and needs to be challenged whatever the issue.
 - b. I spent some time earlier in this speech reviewing the history of the QMS. Indeed, in preparation for this address, I obtained and reviewed a history of the development of the QMS. The system works – it is founded on evidence-based sustainability. It is under threat at the moment because of the extreme views of some groups. It needs to be reaffirmed. As I said earlier, a good place to start would be within Government. Too few officials today have a good understanding of the system's theory or its mechanisms.
 - c. The Kermadec Reserve, and the other reserves I have referred to, will not address the scourge of plastic in the oceans. That is the most pressing issue the nations of the Pacific must confront. That can only happen if an international clean up fund is established with contributions from all nations bordering the Pacific Ocean. Some excellent work is

¹⁰ Whaling in the Antarctic. (Australia v Japan: New Zealand intervening), decision dated 31 March 2014 - <https://www.icj-cij.org/en/case/148>

being done on reducing the need for plastic products – that work needs to speed up. The Royal Society's Report addresses some of the international and regional initiatives that are happening ¹¹. In the near future the World needs to develop a comprehensive convention to address the issue just as it did years ago with the convention on Trans-boundary air pollution.

- d. The best way of addressing stock depletion in this part of the world is to do something about the flotilla of Tuna fishing boats which stay around the northern end of the Kermadec zone awaiting species as they head south. The tuna fleet is mainly based out of American Samoa. The USA needs to address this issue.
- e. If the Sanctuary proposal goes ahead some fishing must be permitted. That is not an absurd proposition. It has been agreed to in Rapa Nui (Easter Island).
- f. The integrity of the 1992 Settlement must be safeguarded at all costs. We have done great work as a nation over the last thirty years to address the historic grievances of Maori. It was clearly understood that these settlements must be full and final, not subject to change every generation or so. That means they must be honoured by all parties. It is the risk of settlements being undermined that greatly troubles me. I don't want this important intergenerational work to founder.

Conclusion:

32. This vexed issue is soluble. We need to focus on what we really want (clean oceans and abundant fish stock) and develop mechanisms which will achieve these outcomes. Those mechanisms must be based on objective science not subjective ideology. We live in scientific world, not the Dark Ages. In preparation for this speech I undertook the inevitable Google search of the phrase "superstition and science" and, for example, reread a study edited by Oliver Hartwich and James Pawton entitled Science versus Superstition: the case for a new scientific enlightenment ¹². I commend this work to you, and particularly the first chapter, where two German authors say that a confident debate about science is needed to open a more optimistic vision of the future.

¹¹ See (7) (above) at p36.

¹² Policy Exchange and University of Buckingham Press, 2006; ISBN 0-9551909-8-3.

33. That is what is needed in this debate. A robust scientific based discussion about what is needed to restore our oceans to health. Let's start a fresh with the Kermadecs discussion without anger or recrimination. Let's maintain the basic principles of the Treaty relationship and the Treaty based agreements we have made. And, this time, let's get it right.